COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss

BARNSTABLE SUPERIOR COURT
INDICTMENT NO. 17-130-01-04

COMMONWEALTH)
)
V.) **SUPPLEMENTAL MEMORANDUM**
)
)
MICHAEL BRYANT, JR.)

ISSUES:

I. **The search of the defendant and the motor vehicle are not justified by the arrest warrant for the defendant.**

The defendant was stopped, seized and arrested due to the outstanding warrant stemming from the Yarmouth Police's investigation of an alleged assault and battery and assault and battery with a dangerous weapon, to wit: shod foot. There was no testimony as to the type of shoe which constituted the shod foot or any items of clothing the defendant may have been wearing during the alleged assault some eight days prior to his arrest.

M.G.L. c. 276, section 1 in pertinent part states:

> A search conducted incident to an arrest may be made only for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment; and removing any weapons that the arrestee might use to resist arrest or effect his escape. Property seized as a result of a search in violation of the provisions of this paragraph shall not be admissible in evidence in criminal proceedings.

In ***Commonwealth v. Perkins, 465 Mass. 600, 605-606 (2013),*** the Supreme Judicial Court stated: " 'Among the exceptions to the warrant requirement is a search incident to a lawful arrest.' Arizona v. Gant, 556 U.S. 332, 338 (2009), citing Weeks v. United States, 232 U.S. 383, 392 (1914). ' The purpose, long established, of a search incident to an arrest is to prevent an individual from destroying or concealing evidence of the crime for which the police have probable cause to arrest, or to prevent an individual from acquiring a weapon to resist arrest or to facilitate an escape.' Commonwealth v. Santiago, 410 Mass. 737, 743 (1991). Thus police may search an automobile incident to the arrest of its driver only where the arrestee 'is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest.' Arizona v. Gant, supra at 346."

Further, in ***Commonwealth v. White, 469 Mass. 96, 100-101 & n.6 (2014),*** the Supreme Judicial Court made it explicit that evidence of the crime for which the defendant has

been arrested should be taken literally, that is evidence of the specific crime and not evidence of the general type of criminal violation.

a. Search of the defendant

While conceivably the officers could pat frisk the defendant for weapons after his arrest to prevent the defendant from gaining access to a weapon, the evidence was clear that the defendant was immediately removed from the vehicle, brought to the ground handcuffed and placed under arrest for the outstanding warrant. The defendant was surrounded by at least five police officers at that time. Clearly, there was no justification for searching the defendant at that time for weapons.

The officers could have searched the defendant for evidence related to the defendant's arrest, to wit: the assaults. However, clearly none of the officers knew what they were looking for or had any real specifics related to the Yarmouth incident. Further, Detective Ginnetty testified that he pat frisked the defendant and knew that the item he felt in the defendant's zippered shirt pocked was not a weapon nor evidence of the assault crime, i.e. a shoe.

Therefore the search of the defendant can not be justified as a search incident to arrest.

b. Search of the motor vehicle

Again, as argued above, the search of the motor vehicle could not be justified as search for weapons. The defendant was immediately arrested, pat frisked and determined not to be armed, and then immediately placed into Officer Green's cruiser. The officers were not at risk of the defendant gaining access to any weapons in the vehicle at that time.

There was no evidence presented that the vehicle would contain any evidence related to the assault that occurred eight days earlier. Again, the officers had no details as to whether the vehicle was even present at the time of the assault, any clothing or shoes worn by the defendant or any knowledge of any conceivable evidence that may be in the vehicle.

Therefore, the search of the vehicle can not be justified as a search incident to arrest.

II The seizure of the cocaine from the vehicle was not a valid plain view seizure.

After the arrest of the defendant Detective Wells advised Detective Butler that he observed movement in the defendant's vehicle, peered into the vehicle and that there was a dog in the vehicle. At that time, the only door open to the defendant's vehicle was the front passenger door. Presumably based on that testimony, Detective Wells either made his observation of the dog either through the open door or through one of the vehicle's windows. As a result of Wells' observation of the dog, Butler opened the rear passenger door, entered into the rear seat area and saw the dog, and then saw something partially sticking out from the front passenger seat, which ultimately was a half kilo of cocaine.

In summary, the plain view doctrine requires that "(1) ...the police are lawfully in a position to view the object; (2) where the police have a lawful right of access to the object and

(3) In cases concerning (a) contraband, weapons or other items illegally possessed, where the incriminating character of the object is immediately apparent.... or (b) other types of evidence ('mere evidence'), where the particular evidence is plausibly related to criminal activity of which the police are already aware... Article 14 of Massachusetts Declaration of Rights adds the requirement that the police come across the object inadvertently. ***Commonwealth v. Silech-Brodeur, 457 Mass. 300, 305-307 (2010).***

a. Whether Detective Butler was lawfully in a position to view the object and had a lawful right of access to the object.

Detective Wells had already relayed to Detective Butler that he had seen a dog in the back seat area of the vehicle. There was no reason or justification at that time for Detective Butler to open the rear door to look at the dog. If his legitimate concern was the confirmation of the presence of the dog he could have easily looked into the back seat area as Detective Wells had, either through the windows or through the already opened front passenger door. There was no immediacy to justify Detective Butler's decision to open the rear door. Apparently the dog was not in any distress, had not been barking, yelping or crying or trying to escape the vehicle. There is no legal justification for opening the rear door at that time. Clearly the defendant had a reasonable expectation of privacy in the rear seat area of the vehicle and Officer's Butler's actions in opening the rear passenger door violated that expectation of privacy without any legal justification.

b. Whether the incriminating character of the object was immediately apparent.

In this instance the both Detective Butler and Ginnetty had described their initial impression of the item in question as something other than being immediately apparent to be contraband. Detective Butler on cross-examination admitted that he previously testified before the Grand Jury that "In the back passenger's, back right passenger compartment of the Range Rover on the floor, rubber floor mat was a large item sticking out almost completely from under the seat. It looked like a wrapped up sub sandwich in cellophane." Detective Ginnetty similarly testified that the item "looked like a sub".

In an effort to justify the conclusion that the item was contraband Detective Butler testified that there was powder at or near the object. However, photographs of the item and surrounding area are inconclusive as to what the "powder" was. It certainly is plausible and sensible that the "power" observed was consistent with the powder found elsewhere in the vehicle and similar in color to the obvious foot markings on the seat just above the "powder", on the door frame on the rear passenger side door and on the slipper laying next to the object. See Exhibit 12, 14, 16, 17 and 18.

III The observation of the dog in the backseat area of the vehicle did not justify the entry into the vehicle as an Emergency Exception to the warrant requirement.

In a landmark case the Supreme Judicial Court recognized an emergency exception to the warrant requirement for non-human life. ***Commonwealth v. Duncan, 467 Mass. 746, 752 (2014),*** held that it was ".. reasonable 'to render aid to relatively vulnerable and helpless animals when faced with people willing or even anxious to mistreat them.'".

The case allows an exception to the warrant requirement that permits law enforcement, in certain circumstances to enter a home on an objectively reasonable basis to believe that there may be an animal inside who is injured or in imminent danger of physical harm. The fact finder should consider whether there was an objectively reasonable grounds to believe that an emergency exists, whether the police conduct was reasonable after entry and whether the animal's condition was caused by human abuse or neglect. If, human abuse or neglect is not suspected than the threshold for entry will be considerably higher. ***Duncan @ 754.***

In this case, it is clear that the small dog was not injured. The only plausible justification for entry into the vehicle would then be that the dog, based on an objectively reasonable basis, was in imminent danger of physical harm and that such condition was caused by human abuse or neglect.

The evidence showed that the dog was calm and docile, not exhibiting any signs of distress by barking, yelping or crying. In fact a good five minutes passed between the arrest of the defendant and anyone noticing the dog. The fact that the defendant was arrested and refused to answer their questions did not subject the dog to imminent danger of physical harm. The officers had the ability to call the Animal Control Officer, and in fact did so - but only after they had returned to the Barnstable Police Station. The act of opening the rear door and entering the vehicle at best was done out of curiosity and not to resolve any imminent danger to the dog. In fact, the act of keeping the dog in the vehicle for at least two hours until the Animal Control Officer arrived at the station belies any real emergency. To further compound any issue, even if there was determined to be a imminent danger of physical harm, there is no evidence that such condition was caused by human abuse.

The Commonwealth's reliance on M.G.L. c. 140, section 174F does not improve the justification for entry into the vehicle, because once again, the actions of the officers in leaving the dog in the vehicle for another two hours after observing the dog by opening the rear passenger door and entering into the vehicle belies any legitimate concern that the health of the animal was threatened by extreme heat or cold and steps were needed to protect the dog.

IV Seizure of drugs from the defendant's person did not justify a search of the motor vehicle either as a search incident to arrest or probable cause to believe the vehicle contained contraband.

The defendant was immediately and forcibly removed from the vehicle after stopping in his driveway. He was handcuffed, pat frisked and transported to a police cruiser within seconds. Once in the cruiser, an officer went into his jacket pocket and removed a bag of pills he believed to be contraband.

a. Search incident to arrest.

A search incident to arrest limited to the area within the arrestee's immediate control. The purpose of such a search is to protect the arresting officer from weapons and to prevent the destruction of evidence, which may be within the reach of the arrestee. ***Commonwealth v. Alvarado, 420 Mass. 542 (1995) ; Chimel v. California, 395 U.S. 752 (1969).***

Further, ***Arizona v. Gant, 556 U.S. 332 (2009)*** "...does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle."

It can not be said here that the search of the vehicle was for the safety of the officers to prevent destruction of evidence. At the time of the search the defendant was handcuffed and seated in a cruiser away from his vehicle. There were several officers on scene. The defendant had no access to the vehicle.

b. Probable cause the vehicle contained contraband apart from the drugs found on the person of the defendant.

Commonwealth v. Alvarado, 420 Mass. 542, 555 (1995) makes clear that the finding of contraband on the person of an occupant of a motor vehicle alone is insufficient to support probable cause to search the motor vehicle. A nexus must be established between the contraband found on the occupant's person and the vehicle to justify the search of the vehicle. As argued infra, there is not probable cause to believe that at the time the vehicle was stopped that it would contain contraband.

V The impoundment of the vehicle was illegal.

At the time the defendant was stopped and placed under arrest, the vehicle which defendant was driving was located on private property, to wit: his residence. The vehicle was searched at the scene, and then later towed away from the scene to the Barnstable Police facility, where subsequently items were seized from the vehicle.

In order for the seizure of the vehicle and items therein to be justified as a valid inventory search (which is not conceded in this case) the propriety of the impoundment of the car must be established. ***Commonwealth v. Brinson, 440 Mass. 609 (2003).*** When a car is lawfully parked in a privately owned lot and there is no evidence that the vehicle presented a safety hazard or was at risk of vandalism or theft there is no justification for the impoundment of the vehicle. See ***Commonwealth v. Dunn 34 Mass.App.Ct. 702 (1993)*** referencing Professor LaFave "...that the police would have no justification for impounding the automobile of an arrested driver if it is parked on the driver's own property..."

There was no evidence presented that the vehicle was a safety hazard or was at risk of vandalism or theft being parked in his driveway and the police in possession of the keys.

Since the vehicle was illegally impounded, and the government agents failed to secure a search warrant to seize the items in the vehicle or to seize the items prior to impoundment there is no legal justification for seizure of the cocaine and other items in the vehicle at the time of their seizure.

VI There was not probable cause that at the time of the search the vehicle would contain contraband.

Initially, the defendant refers the Court to the Memorandum of Law filed by prior counsel at it relates to the probable cause to search the vehicle at the time of the stop based on the prior investigation and surveillance of the defendant. Added to that argument is the evidence solicited at the hearing that surveillance and GPS information had the defendant making off Cape trips to several other locations during that time, including Plymouth, Brockton, Quincy and Boston. Therefore, this evidence bolsters the conclusion that in fact the police had no idea where the defendant had been for the several days since the expiration of the GPS warrant and surveillance. (Last GPS report had the defendant's vehicle in Hyannis on June 8 and there had not been any physical surveillance of him since June 2.) At best it was speculation and conjecture as to the defendant's whereabouts prior to his stop and arrest. Therefore, there was not probable cause to believe that at the time of the stop of his motor vehicle that there would be contraband therein.

Further, the defendant had what Detective Butler referred to as dual residency in New York, with a wife and children living there. Also, the informant information relied upon the police included information that the defendant also utilized alternate methods of transportation to/from New York. No drugs had ever been located in the vehicle nor was there confirmation that the vehicle was utilized for sales or deliveries of narcotics. Although the police believed the defendant had left for New York and would be returning at some point, they did not have any information as to what was the purpose of any such visit. There was no specific information that the defendant would in fact be traveling with drugs on his person or in his vehicle at the time he was stopped. The police had a hunch and acted on such.

Even if there is probable cause to believe a person has committed a crime, that does not necessarily constitute probable cause to search the person's vehicle. ***Commonwealth v. Cinelli, 389 Mass. 197, 213 (1989)*** - probable cause that an individual committed a crime is not probable cause to search their residence.

There must be established a timely nexus between the defendant and the location to be searched such that it can be determined that the particular items of criminal activity sought could reasonably be expected to be found there. ***Commonwealth v. Gallagher, 68 Mass.App.Ct. 56, 59 (2007)***.

Therefore, based on all of the above, it is clear that the police did not have probable cause that there would be drugs inside the vehicle when they stopped, searched and seized items from the vehicle.

Further, while the investigation into the defendant was large in scope in terms of time and tools used by law enforcement, a finding that probable cause existed that drugs would be inside the vehicle at the time of the the stop and search of the vehicle is further lacking in many other respects.

The investigation into the defendant was based on information from two informants, CS1 and CS2, neither of which had their veracity legally established. The only attempt to establish the veracity of either informant was a reference that CS1 was previously used and had led to arrests and indictments. No further information was presented as to the nature of the arrests, i.e. narcotic offenses or other offenses, and if a narcotics related arrest, whether the individuals were arrested for conspiracy or a more substantive offense. Further lacking was any information as to whether there were convictions, any details of the seizure of narcotics, if any, the names

of persons arrested, dates of arrests and the name of the court where the arrests were prosecuted. ***Commonwealth v. Rojas, 403 Mass. 483 (1988); Commonwealth v. Perez-Baez, 410 Mass. 43 (1991); Commonwealth v. Byfield, 413 Mass. 425 (1992)***

Therefore, with a lack of established veracity of the informants, we examine whether there was sufficient independent police corroboration of the information provided by the informants.

a. Insufficient evidence of "controlled buys"

There was conflicting testimony by Detective Butler as to the conduct of the three controlled buys. He testified that all three alleged controlled buys followed the same standard procedures. Initially, he testified that the first controlled buy by CS1on March 21 was a "standard" controlled buy and such standards were enforced. He never mentioned searching CS1 either before or after the buy. The third controlled buy on May 22, was also described in very generic terms without any specific reference to searching CS1 either before of after the alleged transaction. Finally, CS2, a female, was utilized on March 23 and Detective Butler initially testified that that individual was not searched at all and was not provided with any funds for the drugs sought. Detective Butler met with and dealt with CS2 alone during that time. After a long weekend recess and a discussion of his testimony with other officers of Barnstable Police Department, Detective Butler then changed his testimony to say he had searched CS2. The defendant suggests that the Court should not credit any of Detective Butler's revised testimony, as this was his investigation and he alone was handling CS2 before the alleged buy. It is clear that others in the Barnstable Police Department had caused Detective Butler to change his testimony, including Detective Ginnetty and their supervisor, Detective Balcom, who secreted himself in the upstairs gallery of the courtroom.

In any event, none of the controlled buys met either the legal standard for controlled buys or the Barnstable Police Department Policy regarding controlled buys and informants. ***Commonwealth v. Desper 419 Mass.163 (1994).***

The policy states in section 2.0 that "Officers shall follow the procedures outlined in this policy, which provide uniformity, accountability and protection to the officers and the Department in official actions with confidential informants." Section 1.0 refers to "All actions by the CI must be carefully supervised to provide investigative integrity."

Section 6.0, #7 states "Whenever possible, two officers should be present during all contacts with CIs, especially with those of the opposite sex."

Section 8.2 relates to Controlled Purchases and "The use of a CI to make a controlled purchase is subject to the following procedures:" In that section it clearly requires that all CIs will be searched "thoroughly" preceding and after the purchase. The CI's vehicle must also be thoroughly searched. The CI "will" be issued "confidential investigation funds." and remain under constant surveillance. None of these requirements were met for each buy. Detective Butler even testified to not being overly familiar with the policy and suggested that the policy could be molded as the officers saw fit.

Of further note, it must be noted that the defendant was never observed by any police officer during the pendency of the controlled buys, and GPS was unavailable to confirm the whereabouts of the vehicle and/or the defendant.

Finally, any corroboration of defendant's drug activity obtained by the controlled buys was actually contrary to the information provided by the informants. They never indicated that he kept drugs at the Cedar Road address, but on the contrary that the drugs were stored at the Grant Road address. The buys, if anything would show that the defendant had drugs at the Cedar Road address but certainly not in his motor vehicle.

b. Corroboration of only innocent details

Much of what the informants said, in particular the use of the Grant Road property as a "stash" house and the locations of customers of the defendant was not corroborated by the investigation by the police. During the time of the investigation, the officers saw the defendant travel to numerous destinations, including on some occasions to addresses that the informants had identified as customers of the defendant. Not once, was the defendant seen entering these residences, observed engaging in any transactions, and/or carrying any items consistent with drug activity. Further, none of these residences or the occupants therein were ever searched and narcotics recovered therefrom.

As to the Grand Road address, the defendant was again never seen bringing anything into or out of the residence, either in his hands or via any container. In fact the defendant was never observed actually entering the residence, but for on one occasion, only walking out of view into the back of the property. The only time he was seen entering the property he entered through the front door. More importantly, no confirmation was ever made of drugs being stored or kept at the Grant Road address. No search warrant ever issued for the residence and the one time the police were in the house during the investigation, there was no observation of any evidence consistent with drugs being stored or packaged for sale at the residence. The victim of the defendant's assault and the occupant of Grant Road, Peter Lindholm, never offered or provided any confirmation of the defendant's alleged activities at the residence.

MICHAEL BRYANT, JR.
BY HIS ATTORNEY

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March 2, 2018

Office of Clerk-Criminal
Barnstable Superior Court
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Re: Commonwealth v. Michael Bryant
No. BACR2017-00130-01-04

Dear Sir or Madam:

Enclosed for filing please find Memorandum of Law in Support of Motion to Suppress.

Thank you for your assistance.

Very truly yours,

Woodrow Brown

CC: Mr. Michael Bryant
Nicole Manoog, Esq., A/D/A

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE ss

SUPERIOR COURT DEPARTMENT
NO. BACR2017-00130-01--04

COMMONWEALTH

v.

MICHAEL BRYANT

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE

The defendant, Michael Bryant had been surveilled by the police, visually, and through GPS tracking devices placed on the vehicles he had been using for a little over two months as part of a drug distribution investigation.* The authorization for the GPS tracking device expired on either June 7th or June 8th.

On June 9th the police learned that the defendant had travelled off Cape. After learning from the Yarmouth police on June 9th that an arrest warrant had been issued that date for Bryant from the Barnstable District Court on an unrelated matter, on June 10th the Barnstable Police staked out his address at 122 Cedar Street, West Barnstable in anticipation of his return home.

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* The facts for the purpose of the memorandum are taken from "Statement of Facts - For Arraignment" narrative for Sgt. Mark Butler entered 06/10/2017, modified 07/07/2017, Ref: 17-1330-AR. They may differ significantly, depending on the testimony advanced through witnesses at the hearing.

They suspected he would be returning home from New York City after purchasing drugs, however, their only actual knowledge was that he had left the Cape on June 9th.

At approximately 12:50 PM Bryant was spotted on Route 6 travelling east. Officer Green exited West Parish Church parking lot and pursued Bryant, who refused to stop. For approximately one quarter of a mile to his residence at 122 Cedar Street, West Barnstable. There, they stopped his vehicle in his driveway.

Bryant was removed from the passenger side of the vehicle, handcuffed, the interior of his vehicle was scanned for threats, and none were found.

Sgt. Butler then saw a cellphone on the center counsel illuminate. It is unclear where he was located at that instance. The screen on the cellphone indicated a missed call from "Chip", as well as a text message from "Carl", apparently on the same screen. The names "Chip" and "Carl", as well as a number of other names had come up during the drug investigation.

Bryant was searched and a bag containing hundreds of pills were found on his person.

Detective Wells looked through the driver's side window of Bryant's vehicle and saw a small white dog back seat. Sgt. Butler opened the rear passenger side door, presumably in

response to Wells seeing the small white dog in the back seat. While in the car, Butler saw a beige colored object sticking out from the rear of the front passenger seat. The package was, soft, about one foot long and about 4 to 6 inches in diameter, and wrapped in a large amount of pliofilm wrap. He found a white powdery substance underneath, and around the package. The package ultimately turned out to contain a large amount of cocaine.

ARGUMENT

THE UNLAWFUL SEARCH AND SEIZURE OF CONTRABAND FOUND IN BRYANT'S VEHICLE VIOLATED HIS RIGHTS UNDER THE FOURTH AMENDMENT OF THE CONSTITUTION ON THE UNITED STATES AS WELL AS ARTICLE FOURTEEN OF THE MASSACHUSETTS DECLARATION OF RIGHTS.

1. MOTOR VEHICLE STOP, AND SEARCH AND SEIZURE PURSUANT TO THE MOTOR VEHICLE EXCEPTION TO THE SEARCH WARRANT REQUIREMENT

There are basically two separate ways to analyze the facts of this case. The first way would be to view it as a motor vehicle stop, then a search and seizure pursuant to the motor vehicle exception. The defense is not contesting the legitimacy of the stop. It is what happened afterwards that the defense takes issue with.

Probable Cause

Even the motor vehicle exception requires probable cause in order for the police to search a vehicle without a warrant. See Pennsylvania v. Labron, 518 U.S. 938, 940 (1996).

"Probable cause requires evidence that establishes a 'substantial basis,'...to believe that the items sought are related to criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched at the time the search warrant issues'" (or at the time of the search in the case of a warrantless search) Commonwealth v. Banville, 457 Mass. 530, 583 (2010). In this case there was no probable cause.

The police claim that the stop and what transpired afterwards happened as a result of the execution of an arrest warrant. If such was the case, the incident for which the arrest warrant issued occurred on June 2, 2017, one week earlier, and involved complaints of assault and battery with serious bodily harm, assault and battery and assault and battery with a dangerous weapon (shod foot). When Bryant was arrested he was wearing shoes. The police report involving the June 2nd incident contains no information that would make Bryant's shoes relevant to the investigation. But, most importantly, if the search was an effort to find the shoes involved in the assault,

there is no "substantial basis to believe that" (the shoes) would "reasonably…be expected to be located in the place to be searched" (at the time of the search) Id. at 583. There was no substantial basis for the police to believe that Bryant carried the shoes involved in the assault in his car for over a week. The most logical scenario would be that Bryant was wearing the shoes involved in the assault at the time of his arrest, or, if he had changed shoes, the first shoes would be at his house, and he was not carrying them around in his car,

If the Commonwealth bases its probable cause in this case on the information gained on the underlying two-month surveillance of the defendant as well as the recent events unfolding leading up to the stop and subsequent seizure, it, again, falls short of establishing probable cause to search the car. The police, according to the police report, were no longer tracking Bryant. The tracking warrant had expired. They knew that he travelled off Cape on June 9th. They suspected that he went to New York City to purchase drugs, however, they didn't really know where Bryant went, and the great majority of people who travel off Cape, are not destined for New York City. Just as in the case of the shoes, the police did not have a "'substantial basis'... to believe 'that the items sought are related to the criminal activity under investigation, and that

they may be reasonably be expected to be located in the place to be searched" at the time of the search.

Nor did the fact that the police found a bag containing drugs on Bryant's person give them probable cause to search the car. See Commonwealth v. Alvardo, 420 Mass 542, 555 (1995) where the Supreme Judicial Court held that the mere discovery of cocaine on the person of an individual taken from a motor vehicle did not give the police probable cause to believe that his car contained additional drugs, even where the police had observed him with his hand near a box in the car immediately prior to his arrest. See also Commonwealth v. Pena, 69 Mass. App. Ct. 713, 717-718 (2007).

Private Property and the Motor Vehicle Exception

Even, assuming arguendo, that the police had probable cause to search Bryant's vehicle, the automobile exception does not apply. Bryant's vehicle was searched while located on private property, Bryant's driveway. A search and seizure of an automobile is per se unreasonable when conducted on the defendant's property without a search warrant, and, therefore violative of the Fourth Amendment to the Constitution of the United States. See Coolidge v. New Hampshire, 403 U.S. 443, 458-464 (1976). In addition to the rule of Coolidge, even the

rationale for the motor vehicle exception does not exist here: the inherent mobility of a motor vehicle. Bryant was arrested, handcuffed and no one else was in the house or on the property. The scene was secured. The police had Bryant's keys. They could very easily have sought a warrant at the time, or secured the scene and later sought a warrant. In fact, the next day, Sunday, the police obtained a warrant to search his house at that location.

Similarly, Article 14 of the Massachusetts Declaration of Rights limits the motor vehicle exception to the requirement of a search warrant to "when an automobile is stopped in a public way with probable cause" Commonwealth v. Motta, 424 Mass. 117, 124 (1997).

2. SEARCH INCIDENT TO A LAWFUL ARREST

Of course, another way of viewing the facts is a search incident to a lawful arrest. In this case, in addition to the rights afforded a defendant under the Fourth Amendment of the United States, and Article 14 of the Massachusetts Declaration of Rights, Chapter 276, Section 1 of the Massachusetts General laws affords a defendant additional rights:

> "a search conducted incident to an arrest may be made only for the purpose of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest had been made, in order to prevent its destruction or concealment; and removing any weapon that the arrestee

> might use to resist arrest or effect his escape. Property seized as a result of a search in violation of the provisions of this paragraph shall not be admissible in evidence in a criminal trial."

Under a Fourth Amendment analysis, Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710 (2009) set forth two ways to justify a search incident to an arrest in the motor vehicle context: first, if there is no possibility that the arrestee could reach into the area that law enforcement officers seek to search, then there is no justification for the search Id. at 1714; secondly, a search of an automobile is justified incident to an arrest when it is "reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle." Id. at 11714.

Finally, under the Article 14 of the Massachusetts Declaration of Rights "A search incident to an arrest, similar to a search of a person pursuant to a warrant, generally is limited for purposes of both the Fourth Amendment...and art. 14...to the body of the person arrested and the area and items within his or her immediate possession and control at the time." Commonwealth v, Phifer, 463 Mass. 790, 794 (2012 quoting from Commonwealth v. Santiago, 410 Mass. 737, 743 (1991).

The search in this case violates both the Fourth amendment of the Constitution of the United States, Article 14 of the

Massachusetts Declaration of Rights, as well as Chapter 276, Section 1 of the Massachusetts general laws.

As previously discussed, the search occurred after Bryant was removes from the car and handcuffed. The item seized was in the car. It was not within his immediate control or possession at the time that it was seized, and it was not reasonable to believe that evidence relevant to the crime for which he was arrested was located within the car.

3. PLAIN VIEW

The problem that the Commonwealth has with the plain view argument is that when Butler made a "plain view" observation, he had opened the car door and was already in the car, a place that he had no lawful reason for being in. He was not searching the car pursuant to the motor vehicle exception, nor was the search incident to a lawful arrest. "(t)he plain view doctrine requires prior police justification for an intrusion in the course of which an officer inadvertently comes across incriminating evidence." Commonwealth v. Walker, 370 Mass. 548, 557, cert. denied, 429 U.S. 943 (1976). See also Commonwealth v. Sergienko, 399 Mass. 291, 293-295 (1987). There was none here.

While the "plain view" observation violated the Fourth Amendment, the plain view seizure that followed took the transgression to a whole new level.

> "The limits on the doctrine are implicit in its rationale. The first of these is that plain view alone, is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principal discussed above, that no amount of probable cause can justify a warrantless search and seizure absent "exigent circumstances". Incontrovertible testimony of the senses that an incriminating object is on the premised belonging to the criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that police may not enter and make a warrantless seizure."
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> Coolidge v. New Hampshire, supra at 467.

The police should have obtained a search warrant.

CONCLUSION

For the foregoing reasons the drugs found in the motor vehicle should be suppressed

Dated: March 2, 2018

MICHAEL BRYANT
By His Attorney,

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CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that I served a true copy of the foregoing on all parties in interest.

Date: March 2, 2018

Woodrow Brown